187

No. 10-1199

Supreme Court, U.S.
FILED
MAY 2 - 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

EXTREME NETWORKS, INC.,

Petitioner,

v.

ENTERASYS NETWORKS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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2 May 2011

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QUESTION PRESENTED

Where the district court rejected Extreme's request for a final judgment and instead expressly retained jurisdiction in the 5 November 2008 judgment to calculate and award pretrial compensatory damages and prejudgment interest—mandatory patent infringement damages under 35 U.S.C. § 284—did the Federal Circuit correctly hold that it had jurisdiction over this appeal when Enterasys then timely filed its notice of appeal within 30 days after entry of the 19 March 2009 Final Judgment, which for the first time fixed the full amount of statutory patent damages, and also modified the scope of the permanent injunction?

RULE 29.6 STATEMENT

Gores ENT Holdings, Inc., a privately-owned corporation, is a parent of Respondent Enterasys Networks, Inc. Gores ENT Holdings, Inc. is a wholly-owned subsidiary of Enterprise Networks Holdings, Inc., which is in turn a wholly-owned subsidiary of Enterprise Networks Holdings B.V. Through Enterprise Networks Holdings, Inc., Seimens A.G. and Enterasys are under common ownership and control.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Statement	ii
Table of Authorities	v
Statement	1
Reasons for Denying the Petition	1
I. Extreme Mischaracterizes Aspects of the Record that Were Not Fully Discussed in the Nonprecedential Decision Below	2
A. Nonprecedential Decisions Should Not Be Treated as Adding Significantly to the Body of Law They Apply	3
B. More than Merely Prejudgment Interest Remained Unresolved to Render the 5 November 2008 Judgment Not Final	4
II. Patent Statutes and Federal Circuit Precedent Extreme Omits Establishes that Jurisdiction Was Proper	8
A. Congress Enacted a Distinct Statutory Scheme for Patent Cases	9
B. The Federal Circuit Has Consistently Held an Unquantified Monetary Award in a Patent Case Is Not Final	11

TABLE OF CONTENTS—Continued

Page

III. *Osterneck* and Its Progeny Address a Factually and Legally Different Scenario..... 13

IV. Alternatively, Enterasys Secured Its Appellate Rights through Its Stay Motion Filed within 30 Days of the Initial Judgment..... 15

Conclusion..... 16

TABLE OF AUTHORITIES

Page

CASES

Bailey v. Potter, 478 F.3d 409 (D.C. Cir. 2007) 7

Conway v. United States, 326 F.3d 1268 (Fed. Cir. 2003) 7

Crown Packaging Tech., Inc. v. Rexam Beverage Can Co., 559 F.3d 1308 (Fed. Cir. 2009).....6

Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 7

Int'l Rectifier Corp. v. IXYS Corp., 515 F.3d 1353 (Fed. Cir. 2008).....15

Osterneck v. Ernst & Whinney, 469 U.S. 169 (1989).....*passim*

PODS Inc. v. Porta Stor, Inc., 484 F.3d 1359 (Fed. Cir. 2007).....2, 11, 12, 13

SafeTCare Mfg., Inc. v. Tele-Made, Inc., 497 F.3d 1262 (Fed. Cir. 2007).....8

Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340 (Fed. Cir. 2001).....10, 12, 13

View Eng'g, Inc. v. Robotic Vision Sys., Inc., 115 F.3d 962 (Fed. Cir. 1997).....12, 13

STATUTES AND RULES

28 U.S.C. § 1291 10

28 U.S.C. § 1292(c)(2).....2, 9, 10

28 U.S.C. § 1295 10

TABLE OF AUTHORITIES—Continued

Page

35 U.S.C. § 284 ..... *passim*

35 U.S.C. § 285 12

FED. R. APP. P. 3 15

FED. R. APP. P. 4(a)(1) 15

FED. R. APP. P. 4(a)(4) 14

FED. R. APP. P. 4(a)(4)(A)(vi) 14

FED. R. APP. P. 4(a)(4)(B)(ii) 15

FED. R. APP. P. 4(a)(7) 7

FED. R. CIV. P. 11 12

FED. R. CIV. P. 58 7

FED. R. CIV. P. 59(e) 14

FED. R. CIV. P. 60(b)(2) 6, 7

Supreme Court Rule 15.2 ..... 4, 15

Federal Circuit Rule 32.1 3

Federal Circuit Rule 35 3

Federal Circuit Rule 36 3

STATEMENT

Petitioner Extreme Networks, Inc. in seeking a writ of certiorari inappropriately narrows the question presented to "[w]hether an unqualified money judgment for a sum certain" was final. Unfortunately for Extreme, the underlying premise of its question as phrased is indisputably false, even by its own admission. Note 1 of Extreme's petition recognizes that the jury only awarded Extreme damages for a limited portion of the infringement found. The district court entered an initial judgment with the explicit expectation of calculating the remaining royalty damages, as required by 35 U.S.C. § 284, and fixing the amount of prejudgment interest sought. Under longstanding Federal Circuit jurisprudence applying statutes exclusive to patent law, only the 19 March 2009 Final Judgment from which Enterasys timely appealed satisfied the patent damages and federal appellate jurisdiction prerequisites to start the 30-day period to file a notice of appeal.

REASONS FOR DENYING THE PETITION

No broader circuit split, "widespread confusion shared across the courts of appeals," or "disarray" is implicated by this decision of the Federal Circuit. That court properly applied its own well-established case law, which in turn relies on the unique patent damages statute, 35 U.S.C. § 284, informed by its separate interlocutory appellate jurisdiction statute

pertaining to finality, 28 U.S.C. § 1292(c)(2). Notably, Extreme omits both of these statutes from its petition, and glosses over the nonprecedential nature of the decision it challenges here. Under, *e.g.*, *PODS Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007), the Federal Circuit correctly took jurisdiction over Enterasys's appeal. In contrast, in light of the foregoing, and when the additional procedural details that Extreme ignores in its petition are considered, *Osterneck v. Ernst & Whinney*, 469 U.S. 169 (1989), and its progeny relied on by Extreme are readily distinguishable and not at issue here.

I. Extreme Mischaracterizes Aspects of the Record that Were Not Fully Discussed in the Nonprecedential Decision Below.

Extreme exploits the abbreviated format of the nonprecedential decision of the Federal Circuit, which emphasized the lack of prejudgment interest in the district court's initial judgment. In the process, Extreme fails to acknowledge until page 12 of its petition that the decision below was in fact nonprecedential, excising that significant procedural reality from the citation format in its Opinions Below section, as well as removing the "nonprecedential" legend required by the issuing court's rules from the copy of the opinion itself reprinted in the appendix at Pet. App. 1a.

A. Nonprecedential Decisions Should Not Be Treated as Adding Significantly to the Body of Law They Apply.

The Federal Circuit takes the distinction between its precedential and nonprecedential decisions seriously, and has adopted its own specific rules on this:

> **Rule 32.1 Citing Judicial Dispositions**
>
> **(a) Disposition of Appeal, Motion, or Petition.**
>
> Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A nonprecedential disposition shall bear a legend designating it as nonprecedential. A precedential disposition shall bear no legend.
>
> **(b) Nonprecedential Opinion or Order.**
>
> An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law.

The Federal Circuit further instructs in the Practice Notes to its Rule 35 that, "A petition for rehearing en banc is rarely appropriate if the appeal was the subject of a nonprecedential opinion by the panel of judges that heard it." Enterasys submits

that a petition for a writ of certiorari is even less appropriate.

B. More than Merely Prejudgment Interest Remained Unresolved to Render the 5 November 2008 Judgment Not Final.

Extreme's attempt to use this unpublished decision of the Federal Circuit as a vehicle to interest this Court in a purported circuit split on a broader appellate jurisdiction issue illustrates the danger in blurring the lines between precedential and non-precedential decisions. Numerous details of the proceedings below were not discussed in full in the Federal Circuit's short opinion, which Enterasys will endeavor to fill in as contemplated by this Court's Rule 15.2. Most importantly, the pending issues that precluded finality at the time of the district court's initial 5 November 2008 judgment were not limited to a determination of prejudgment interest, as Extreme would have the Court misguidedly believe, but included a calculation of pretrial damages and the scope of the permanent injunction.

Strangely, Extreme repeatedly admits that it had demanded both "supplemental damages" and prejudgment interest, while overlooking the significance of this in its argument. Note 1 of the petition explains that the 30 May 2008 jury verdict only awarded compensatory damages through 8 January 2008, and that Extreme was due additional compensation from that date forward to make it whole. The district court

was well-aware of this, it was not a "mistake" that needed to be addressed with postjudgment motions.

In a motion filed 5 June 2008, well before the initial judgment, Extreme emphasized the need for additional financial information from Enterasys to calculate the remaining damages owed. A19072.[1] Attached to Extreme's filing was a Proposed Order for Final Judgment and Permanent Injunction that (1) stated the jury verdict amount of $201,213; (2) provided blank lines for the court to fill in for damages from 9 January 2008 forward; (3) similarly provided blank lines for prejudgment interest; and, (4) asked the court to include language that, "This is a Final Judgment and is Appealable." A19080-84.

Enterasys responded by providing a letter and CD with the first portion of the requested financial information 6 days later, on 11 June 2008, A22585-86; followed by the remainder sent on 22 August 2008, A22587-88. In other words, the request for the still-unquantified damages and the prejudgment interest was made approximately 5 months prior to entry of the initial 5 November 2008 judgment. Likewise, Extreme held in its hands the necessary financial information months before entry of the initial judgment to quantify pending damages.

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[1] For these undisputed additional record details, Enterasys provides the Federal Circuit Joint Appendix cites.

Rather than fill in the blanks and enter a complete final judgment that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1311 (Fed. Cir. 2009), the district court entered a preliminary judgment that left out both the additional damages and the prejudgment interest. Significantly, the court rejected Extreme's request for "Final Judgment" language, and instead ordered the opposite—"This court retains jurisdiction to enforce any and all aspects of this order and to award plaintiff supplemental damages and costs." Pet. App. 32a.[2]

Having failed to obtain the Final Judgment it requested, Extreme waited 55 days to file its Motion for Supplemental Damages and Interest on 30 December 2008. While Extreme now admits it "did not invoke any rule in filing this motion," Pet. at 10, it had tried to revise history before the Federal Circuit and falsely claimed this was a Rule 60(b)(2) motion based on "newly discovered evidence."[3]

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[2] Extreme's suggestion on page 29 and note 10 of its petition that the district court necessarily and implicitly denied its requests for prejudgment interest and mandatory damages under § 284 is simply nonsensical. The court specifically retained jurisdiction to decide these critical issues that were actively pending, and as expected it did rule on them in due course.

[3] On page 3 of Extreme Networks' Reply in Support of Its Cross-Appeal, Extreme wrote "While not expressly citing the rule, Extreme Networks' motion was pursuant to FED. R. CIV. P. 60(b)(2), which, by its own terms, 'does not affect the finality of a

(Continued on following page)

In reality, Extreme had sat for months on the financial information sent by Enterasys. Almost certainly, Extreme took its time precisely because it recognized that the district court "retain[ed] jurisdiction" and no such Rule 60(b) motion was required on damages.

Extreme also declines to discuss the changes the 19 March 2009 Final Judgment made to the scope of the permanent injunction against Enterasys. Both parties filed motions following the initial 5 November 2008 judgment to modify the scope of the injunction. The court denied Extreme's motion, but granted Enterasys's in two respects. The district court rewrote the injunction to allow Enterasys to (1) service existing customers; and, (2) use its own products internally. Pet. App. 42a-43a, 46a-49a (16 March 2009 Order); 52a-54a (19 March 2009 Final Judgment).

"[W]hen the lower court changes matters of substance . . . in a judgment previously rendered . . . the period within which an appeal must be taken . . . begin[s] to run anew." *Conway v. United States*, 326 F.3d 1268, 1276 (Fed. Cir. 2003) (quoting *Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952)). Accordingly, these significant changes to the 5 November 2008 judgment required a written entry of judgment under FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7). *See Bailey v. Potter*, 478 F.3d 409, 411 (D.C. Cir. 2007) (separate

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judgment or suspend its operation.'" Extreme has dropped that characterization before this Court.

document requirement is "interpreted to prevent loss of the right to appeal, not facilitate loss"). This in turn triggered a 30-day period from the 19 March 2009 Final Judgment to file a notice of appeal, independent of the incomplete damages calculation and missing prejudgment interest in the first judgment. Where substantive issues remain unresolved, a "judgment standing alone as issued by the district court [is] insufficient to establish dismissal of the entire action." *See SafeTCare Mfg., Inc. v. Tele-Made, Inc.*, 497 F.3d 1262, 1267 (Fed. Cir. 2007).

As set forth in greater detail in Part III, *infra*, this fuller picture of the record instantly distinguishes Extreme's primary authority, *Osterneck v. Ernst & Whinney*, as well as the other decisions Extreme relies on that dealt strictly with concerns about appellate jurisdiction when prejudgment interest—alone—remained unresolved. Presumably that explains why the Federal Circuit declined to discuss *Osterneck* at all, though counsel for Extreme devoted much of her oral argument to it. *Osterneck* is inapposite for other reasons as well.

II. Patent Statutes and Federal Circuit Precedent Extreme Omits Establishes that Jurisdiction Was Proper.

Compounding its disregard of key procedural realities, Extreme additionally neglects to inform the Court about precedential case law from the Federal

Circuit directly on point, along with the unique patent damages statute, 35 U.S.C. § 284, and appellate jurisdiction statute, 28 U.S.C. § 1292(c)(2), that further render this case distinct from, *e.g.*, *Osterneck*.

A. Congress Enacted a Distinct Statutory Scheme for Patent Cases.

Section 284 governs damages in a patent case:

> **35 U.S.C. § 284 Damages**
>
> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.
>
> When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed. Increased damages under this paragraph shall not apply to provisional rights under section 154(d) of this title.
>
> The court may receive expert testimony as an aid to the determination of damages or of what royalty would be reasonable under the circumstances.

Given that the district court "shall" compensate Extreme fully "for the use made of the invention by

[Enterasys]," no "unqualified money judgment for a sum certain" could have existed, contrary to the recurring misstatements in Extreme's petition, until entry of the 19 March 2009 Final Judgment. Extreme concedes that the jury's award of $201,213 did not cover the full period of infringement. Pet. at 9 n.1, 11. Plus, the district court had indicated that it would fix interest, including the prejudgment interest, which under section 284 then becomes an essential element of the final judgment in a patent case.

Similarly absent from Extreme's petition, beyond 28 U.S.C. § 1291 and § 1295, Congress separately provided an avenue in § 1292(c)(2) for "interlocutory" appeals to the Federal Circuit in exactly this sort of situation that arises regularly in patent cases:

> **28 U.S.C. § 1292. Interlocutory Decisions**
>
> **(c)** The U.S. Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
>
> > **(2)** of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the U.S. Court of Appeals for the Federal Circuit and is final except for an accounting.

The Federal Circuit confirmed that "'[a]ccounting,' as used in the statute, refers to infringement damages pursuant to 35 U.S.C. § 284." *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1343 n.2 (Fed. Cir. 2001). The creation of interlocutory jurisdiction where a

patent infringement judgment is "final except for an accounting" of course proves that such a result otherwise is not an appealable final judgment. Congress thereby recognized what Extreme refuses to. Applying this logic, the 5 November 2008 judgment, lacking a full accounting of damages, could not be final.

B. The Federal Circuit Has Consistently Held an Unquantified Monetary Award in a Patent Case Is Not Final.

A longstanding and consistent body of Federal Circuit precedent addressing its unique jurisdiction over patent appeals, none of which Extreme cites, demonstrates that jurisdiction was proper here.

First and foremost, the Federal Circuit dealt with the same issue, albeit arising from a slightly different procedural posture, in *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007). The *PODS* district court entered a first judgment where the accompanying order stated the court's intent to entertain a motion for additional damages. *See id.* at 1365. Like here, a subsequent motion was filed and granted, and the district court enhanced the preliminary damages award. *See id.* at 1365 & n.4. In *PODS*, however, unlike Enterasys, the appellant went ahead and filed a notice of appeal based on the initial judgment. *See id.* The Federal Circuit held that the notice of appeal was premature, because the first judgment was not final, though it ultimately took jurisdiction over the

appeal. *See id.* By this reasoning, the district court's 5 November 2008 judgment was also not final, and Enterasys correctly relied on the 19 March 2009 Final Judgment.

The Federal Circuit applied this reasoning in two other analogous situations to conclude that judgments in patent cases with unquantified monetary components, as here, were not final for jurisdictional purposes. In *Special Devices*, at issue was the finality of a judgment that awarded but did not quantify attorney fees under 35 U.S.C. § 285. *See* 269 F.3d at 1343. Observing that section 285, like section 284, is unique to patent law, the court applied its own precedent. *See id.* The Federal Circuit then "conclude[d] that a decision to award unquantified attorney fees in an exceptional case under 35 U.S.C. § 285 is not final." *Id.* at 1345.

The *Special Devices* opinion relied heavily on the Federal Circuit's earlier decision in *View Engineering*, which reached the same result in the context of an award of unquantified Rule 11 sanctions. *See id.* at 1343; *View Eng'g, Inc. v. Robotic Vision Sys., Inc.*, 115 F.3d 962 (Fed. Cir. 1997). There, given that FED. R. CIV. P. 11 is not unique to patent law, the court collected decisions from six other circuits, each of which held that such a sanction order "is not final for purposes of appeal until the district court has decided the amount of liability." *View Eng'g*, 115 F.3d at 964. The Federal Circuit then decided that a "decision imposing Rule 11 sanctions is not final, and hence not

appealable, until the amount of the sanction has been decided by the district court." *Id.*

PODS, *Special Devices*, and *View Engineering* all instruct that an incomplete—*i.e.*, unquantified—award of compensatory damages in a patent case under section 284 cannot be final. Therefore, Enterasys properly waited for entry of the second judgment on 19 March 2009 to measure its time to file a notice of appeal. Extreme's petition does not challenge this body of Federal Circuit case law in any way, rather Extreme avoids it entirely and would divert the Court's attention to less-applicable decisions from other circuits.

III. *Osterneck* and Its Progeny Address a Factually and Legally Different Scenario.

In terms of authority, Extreme anchors its petition on the notion that "no material difference" exists between this case and *Osterneck*. Pet. at 14. As explained above, nothing could be further from the truth, after a more-complete presentation of the events in the district court and the relevant statutes.

Not only is Extreme's factual predicate for the attempted comparison to *Osterneck* wrong, but Extreme misses the point of that opinion itself. *Osterneck* only analyzed the narrow question of "whether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of appeal filed before a ruling on that

motion."[4] *Osterneck*, 489 U.S. at 170. The district court had invited, and plaintiffs filed, a motion for prejudgment interest within 10 days of the judgment.[5] *See id.* at 172. After the court granted the motion, plaintiffs filed a new notice, but left off Ernst & Whinney as a party. *See id.* The court of appeals held, and this Court affirmed, that the earlier notice of appeal was ineffective to preserve the appeal as to Ernst & Whinney. *See id.* at 173.

To begin with, *Osterneck* dealt with a motion exclusively for prejudgment interest. Here a portion of the reasonably royalty damages mandated by section 284 indisputably remained pending. Meanwhile, Extreme's motion for both categories of additional damages was admittedly not captioned under any rule, and was filed 55 days after the initial 5 November 2008 judgment. Because FED. R. CIV. P. 59(e) allows only 28 days to file a motion, however Extreme may wish to recaption its motion *ex post facto*, it could never be held to have been a FED. R. CIV. P. 59(e) motion. *Osterneck* simply cannot be contorted to fit the scenario before the Court.

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[4] FED. R. APP. P. 4(a)(4) was amended in 1993 to allow that a premature notice of appeal in a scenario like this would become effective on disposition of the motion, not merely void.

[5] The 10-day time limits in FED. R. CIV. P. 59(e) and FED. R. APP. P. 4(a)(4)(A)(vi) were changed to 28 days in 2009.

IV. Alternatively, Enterasys Secured Its Appellate Rights through Its Stay Motion Filed within 30 Days of the Initial Judgment.

Finally, for the sake of completeness in complying with the Court's Rule 15.2, Enterasys argued below and maintains here that, even if the 5 November 2008 judgment is treated as final, Enterasys nevertheless timely filed a FED. R. APP. P. 3 notice of appeal by filing a motion to stay the injunction pending appeal. When filed within the 30-day time period allowed under FED. R. APP. P. 4(a)(1)(A), a motion to stay serves as notice of appeal under FED. R. APP. P. 3 if it meets three requirements: "[i]t must (A) specify the party or parties taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." *Int'l Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (quotation omitted). Enterasys's motion to stay the injunction easily satisfied these requirements, and is functionally identical with the motion that succeeded in *IXYS*.

Furthermore, Enterasys's motion to stay both identified the 5 November 2008 judgment and the district court's (future) order addressing Enterasys's forthcoming new-trial motion. That the court had not yet ruled on Enterasys's expected new-trial motion is immaterial, because FED. R. APP. P. 4(a)(4)(B)(ii) states that a notice of appeal filed after judgment (here, the 5 November 2008 judgment) but before a ruling on a new trial motion becomes effective when the order disposing of the last such remaining motion

is entered. Accordingly, Enterasys's motion to stay alternatively secured its appellate rights.

CONCLUSION

Extreme's petition for a writ of certiorari fails to establish any compelling basis for further review of the Federal Circuit result. To the contrary, Extreme merely takes advantage of the abbreviated nonprecedential format of the decision below to paint a woefully inadequate and unfair caricature of what transpired in the district court. Upon consideration of the fuller picture of the proceedings in light of the relevant patent specific statutes and Federal Circuit precedent, Extreme's petition should be denied.

Respectfully submitted,

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2 May 2011